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<b>RONALD E. OGDEN, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 04-288</b>
	)	<b>Issued: January 25, 2005</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Syracuse, NY, Employer</b>	)	
	)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

On November 12, 2003 appellant filed an appeal of a merit decision of the Office of Workers' Compensation Programs dated October 27, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether the Office properly found that appellant received an overpayment of compensation in the amount of \$37,452.09 based on his forfeiture of compensation for the periods July 1, 1993 to February 25, 1997, May 2 to 23 and June 3 to August 5, 1997; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment.

On September 3, 1990 appellant, then a 28-year-old mailhandler, filed a claim for a traumatic injury to his right knee occurring on that date in the performance of duty. Appellant stopped work on September 4, 1990 and did not return. The Office accepted appellant's claim

for an avulsion of the right tibia and a right knee anterior cruciate tear. The Office placed appellant on the periodic rolls effective November 29, 1990.

The Office required appellant to complete periodic Form CA-1032 questionnaires regarding whether he had any earnings from employment or self-employment for the previous 15 months. The Office advised appellant on the Form CA-1032 that he was obligated to “immediately” report any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. Appellant completed his first Form CA-1032 on October 10, 1991.

In a CA-1032 form dated September 1, 1994, appellant indicated that he had not been employed or self-employed for the previous 15 months. In an undated CA-1032 form, received by the Office in August 1995, appellant marked through the entire form, including the signature line, with notations that the questions were not applicable.

As part of the Office’s vocational rehabilitation efforts, on February 26, 1996 appellant began working as a service technician with a private company, Northern Copy Products. The Office reimbursed the company for the cost of appellant’s salary.<sup>1</sup>

An official with Northern Copy Products informed appellant’s rehabilitation counselor that the company ceased to employ appellant as of April 9, 1996 due to his unreliability and prior commitments to his work as a bartender.

By letter dated April 18, 1996, the Office notified appellant that the CA-1032 form received on August 18, 1995 was not signed and, therefore, invalid. The Office enclosed another CA-1032 form for completion. The Office informed appellant that the period covered by the CA-1032 form was from September 2, 1994 until the date of his signature on the current form. Appellant submitted a CA-1032 form, signed on April 20, 1996, in which he listed his employment through the Office vocational rehabilitation program as a copier service technician with Northern Copy Products from February 26 to April 9, 1996. Appellant listed no other employment or self-employment for the period covered by the form, September 2, 1994 to April 20, 1996.

In a Form CA-1032 dated August 21, 1996, appellant listed employment from February to March 1996, as a technician with Northern Copy Products as his only employment or self-employment. In a Form CA-1032 dated January 22, 1997, appellant listed employment from February to March 1996, as a technician with Northern Copy Products and employment from January 7, 1997, to the present working in ice fishing.

In a memorandum of interview dated January 22, 1997, an inspector with the employing establishment noted that appellant reported working since December 1, 1996 at Schwan’s Ice Cream. He further noted that appellant related that he worked for a few months around two years ago at Riveredge Resort and Hotel as a bartender and a few days at Bootlegger’s Bay as a bartender for tips only. The inspector stated that, after showing appellant his wage and tax

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<sup>1</sup> In a decision dated March 18, 1996, the Office found that appellant’s actual earnings as a service technician effective February 26, 1996 fairly and reasonably represented his wage-earning capacity.

statements for 1994 and 1995, appellant admitted that he worked from April 24, 1994 to August 6, 1995 as a bartender. The inspector also showed appellant a copy of an arrest report dated June 23, 1996, which lists appellant's occupation as a bartender.

In an investigative memorandum dated February 27, 1997, an inspector with the employing establishment concluded that appellant made false statements about his employment from April 24, 1994 through January 22, 1997. He related that appellant worked from April 24, 1994 through August 6, 1995, as a bartender with the Riveredge Resort and Hotel. The inspector further noted that appellant was questioned by a special agent with the Office of the Inspector General of the Department of Labor regarding employment for the period covered by his August 20, 1996 Form CA-1032. He related that appellant denied employment except for his rehabilitation job with Northern Copy Products. The inspector noted, however, that upon further questioning about employment at Schwan's Ice Cream and Riveredge Resort and Hotel appellant "acknowledged that he worked the whole period covered by the payroll records indicating April 24, 1994 through August 6, 1995." The inspector submitted supporting evidence with the investigative memorandum, including wage and tax statements showing earnings from the Riveredge Resort and Hotel in the amount of \$5,731.99 for 1994 and \$4,096.23 for 1995. He also submitted information from the Riveredge Resort and Hotel confirming appellant's employment from April 24, 1994 through August 6, 1995.

On July 25, 1997 the Office requested that appellant complete an enclosed Form CA-1032. Appellant completed the Form CA-1032 on August 6, 1997 and listed employment from November 1996 to February 1997 with Schwan's Ice Cream earning \$200.00 per week and employment in May 1997 with Frontinac Crystal Spring Water earning \$7.00 per hour.<sup>2</sup> Appellant further noted that he was employed on commission by Jefferson Bottling Company.

In a letter dated December 4, 1997, an official with Schwan's Ice Cream informed the Office that it had employed appellant as a route manager from November 25, 1996 to February 25, 1997.<sup>3</sup> The official included appellant's wage and hour information showing appellant's weekly wages from December 6, 1996 to March 18, 1997.

In a letter dated January 7, 1998, an official with the Pine Tree Point Resort notified the Office that appellant was employed at the resort as a bartender from August 27 to September 21, 1997, with total wages of \$566.67.

In a plea agreement signed by appellant on February 24, 1998 appellant admitted that during the period April 24, 1994 to August 5, 1995, he made false statements in order to obtain workers' compensation benefits in violation of 18 U.S.C. § 1920. Appellant agreed to pay restitution in the amount of \$6,337.26.

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<sup>2</sup> By decision dated August 14, 1996, the Office denied appellant's claim for a recurrence of disability beginning April 9, 1996 causally related to his September 3, 1990 employment injury.

<sup>3</sup> The official listed appellant's employment as from November 25, 1997 to February 25, 1997 rather than November 25, 1996 to February 25, 1997; however, this is a typographical error as evidenced by the accompanying wage and hour history, which shows that appellant earned wages from December 6, 1996 to March 18, 1997.

By decision dated March 23, 1998, the Office terminated appellant's compensation benefits effective March 29, 1998, pursuant to 5 U.S.C. § 8148(a) on the grounds that he had committed fraud related to his receipt of compensation payments.

On June 24, 1998 a judge with the U.S. District Court for the Northern District of New York accepted appellant's guilty plea and sentenced him to three years probation. He further ordered appellant to pay restitution in the amount of \$6,337.26.

By decision dated October 22, 1999, the Office found that appellant forfeited his entitlement to compensation for the periods July 1, 1993 through February 25, 1997, May 2 to 23 and June 3 to August 5, 1997. The Office determined that appellant had omitted earnings on Forms CA-1032 covering the period July 1, 1993 through January 22, 1997. The Office found that appellant had reported his employment activities on his Form CA-1032 dated August 6, 1997 but found that "for any work activity that was performed but not reported prior to this date, compensation will be declared forfeited for the actual period of the work activity." The Office concluded that appellant had not reported his work with Schwan's Ice Cream through February 25, 1997 or his work with Frontinac Crystal Spring Water from May 2 to 23, 1997 prior to submitting his August 6, 1997 CA-1032 form and that, therefore, he forfeited compensation from January 22 to February 25 and May 2 to 23, 1997. The Office further noted that appellant reported his work with a bottling company from June 3 through August 22, 1997 and that, therefore, "only compensation during the period that the claimant failed to report the work activity or from June 3 through August 5, 1997 is declared forfeit."

On October 25, 1999 the Office notified appellant of its preliminary determination that an overpayment of compensation existed in the amount of \$50,126.61 for the periods July 1, 1993 through February 25, 1997, May 2 to 23 and June 3 to August 5, 1997, as he forfeited compensation for these periods. The Office further made a preliminary determination that appellant was at fault in the creation of the overpayment.

In a letter dated November 11, 1999, received by the Office on November 15, 1999 appellant noted that the Office's October 25, 1999 letter was inaccurate because it covered a greater period than the period in which he entered a guilty plea in court. Appellant further noted that the letter was not accurate because the Office "omitted some places of employment during the time period in question." Appellant submitted waiver information and requested a prerecoupment hearing.<sup>4</sup> In another letter dated December 10, 1999, appellant, through an attorney, requested a hearing.

By decision dated December 27, 1999, the Office finalized its determination that an overpayment existed in the amount of \$50,126.61 because he forfeited compensation for the periods July 1, 1993 through February 25, 1997, May 2 to 23 and June 3 to August 5, 1997. The Office further finalized its determination that appellant was at fault in the creation of the overpayment.

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<sup>4</sup> It does not appear from the record that the Office took any action on appellant's request for a hearing. However, appellant's opportunity for further review, together with the present review by the Board on this appeal, constitute meaningful postdeprivation processes by which the government is able to address the procedural error after it occurs. *Lan Thi Do*, 46 ECAB 366 (1994).

The Office periodically notified appellant that it had adjusted the amount of the overpayment in accordance with the amount he paid as part of the court-ordered restitution.<sup>5</sup>

In a decision dated February 20, 2002, the Office found that appellant was at fault in the creation of an overpayment in the amount of \$37,452.09, because he forfeited compensation for the periods July 1, 1993 through February 25, 1997, May 2 to 23 and June 3 to August 5, 1997. The Office noted that appellant had paid court-ordered restitution in the amount of \$6,337.26 and now owed the Office \$37,452.09. The Office further found that appellant was delinquent on his payments and, after considering his monthly income and expenses, determined that he could repay \$500.00 per month beginning March 21, 2002.

On March 13, 2002 appellant appealed to the Board. On October 18, 2002 the Board issued an order remanding case for reconstruction of the case record and an appropriate decision by the Office.<sup>6</sup>

In a decision dated October 27, 2003, the Office reissued its February 20, 2002 decision. However, due to a typographical error, the Office noted in the cover letter to the decision that appellant was without fault. In the February 20, 2002 memorandum accompanying the October 27, 2003 decision and incorporated by reference, the Office found that appellant was not without fault in the creation of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who: "fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required."<sup>7</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.<sup>8</sup> The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."<sup>9</sup> The Board has held that the Office can meet this burden of proof in several ways, including appellant's own admission to the Office that he failed to report employment or earnings which he knew he should report or establishing that appellant has

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<sup>5</sup> By letter dated February 10, 2001, the Office noted that the restitution ordered by the court in appellant's case did not constitute a "global settlement" and thus the Office could recover the remainder of the debt owed by appellant.

<sup>6</sup> Docket No. 02-1013 (issued October 18, 2002).

<sup>7</sup> 5 U.S.C. § 8106(b)(1) and (2).

<sup>8</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>9</sup> 20 C.F.R. § 10.5(n).

pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

In order to determine whether an overpayment of compensation occurred in this case, the Board must initially determine whether appellant forfeited his right to monetary compensation from July 1, 1993 to February 25, 1997, May 2 to 23 and June 3 to August 5, 1997.

The evidence of record establishes that appellant “knowingly” concealed his earnings from employment from the Office on CA-1032 forms covering the periods July 1, 1993 through August 21, 1996 and October 22, 1996 through January 22, 1997. On a CA-1032 form dated September 1, 1994 appellant responded “no” to the questions concerning employment, self-employment and earnings and responded “yes” to a question regarding whether he was unemployed for the 15-month period preceding each form. The explicit language of the form advised appellant that all employment must be reported. Appellant returned his 1995 CA-1032 form unsigned. The Office instructed him to complete another CA-1032 form and to provide employment information from September 1, 1994, the date of the last submitted CA-1032 form, to the date of signature on the new form. In a CA-1032 form dated April 20, 1996, appellant listed as his only employment his job obtained and paid for through the Office rehabilitation program. Appellant further signed a Form CA-1032 dated August 21, 1996, in which he again listed his rehabilitation position with Northern Copy Products as his only employment or self-employment. However, an investigative memorandum revealed that appellant worked from April 24, 1994 through August 6, 1995 as a bartender at the Riveredge Resort and Hotel. Therefore, appellant had unreported earnings during the time covered by the CA-1032 forms dated September 1, 1994, April 20 and August 21, 1996. On June 24, 1998 appellant was convicted in U.S. District Court of one count of making false statements during the period April 24, 1994 through August 5, 1995, in order to obtain federal employees’ compensation in violation of 18 U.S.C. § 1920. In entering his guilty plea, appellant admitted that he omitted his earnings from employment or self-employment in order to obtain compensation benefits. The Board finds that appellant’s guilty plea constitutes persuasive evidence that he knowingly omitted earnings for the periods covered by the CA-1032 forms dated September 1, 1994, April 20 and August 21, 1996. If a CA-1032 form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.<sup>11</sup> Therefore, the Office properly found that an overpayment existed for the period July 1, 1993 through August 21, 1996, as appellant forfeited his entitlement to compensation.

Appellant further submitted a January 22, 1997 Form CA-1032, in which he listed employment ice fishing from January 7, 1997 to the present and also listed his employment with Northern Copy Products from February to March 1996. However, in an interview with an inspector with the employing establishment on January 22, 1997 appellant admitted working at Schwan’s Ice Cream since December 1, 1996. An official with Schwan’s Ice Cream related that

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<sup>10</sup> *Barbara L. Kanter, supra* note 8.

<sup>11</sup> *William G. Norton, Jr.*, 45 ECAB 630 (1994).

appellant worked for the company as a route manager from November 25, 1996 to February 25, 1997 and enclosed evidence regarding his earnings. The factual circumstances of record, including appellant's reporting of his other employment and his signing of a strongly-worded certification clause on the CA-1032 form, provide persuasive evidence that he "knowingly" understated his earnings and employment activities on the CA-1032 form dated January 22, 1997. Appellant, therefore, forfeited his right to compensation during this period and the amount paid him during the period covered by the form, October 22, 1995 to January 22, 1997, constitutes an overpayment of compensation.

Regarding the period covered by the CA-1032 form dated August 6, 1997, the Office found that appellant had fully reported his earnings and employment on the August 6, 1997 CA-1032 form but further determined that he forfeited entitlement to compensation during the time covered by the form that he actually worked, January 22 to February 25, May 2 to 23 and June 3 to August 5, 1997 because he did not otherwise report his earnings immediately to the Office. The Board has held that an appellant may be subject to the forfeiture provision of section 8106(b)(1) of the Act for failure to immediately report earnings if the Office has informed him or her of the duty to report such earnings.<sup>12</sup> During such periods appellant forfeits his entitlement to compensation only for the time he was employed.<sup>13</sup> In this case, the Office repeatedly informed appellant on Forms CA-1032 of his duty to immediately report any earnings from employment. From October 10, 1991 onward, appellant signed numerous certification clauses on Forms CA-1032 which stated as follows:

"I understand that I must *immediately* report to [the Office] any improvement in my medical condition, *any employment*, any change in the status of claimed dependents, any third party settlement and any change in income from Federally assisted disability or benefit programs." (Emphasis added.)

Appellant was thus aware of his duty to immediately report any employment to the Office, as evidenced by his repeated signing of certification clauses on Forms CA-1032 notifying him of this requirement. He did not, however, report his earnings from January 22 to February 25, 1997, May 2 to 23, 1997 and June 3 to August 5, 1997 until August 6, 1997.<sup>14</sup> Consequently, he forfeited his entitlement to compensation for the periods in which he actually worked from January 22 to February 25 and May 2 to 23, 1997, in accordance with section 8106(b)(1). For the period June 3 to August 5, 1997, the Board finds, however, that, under the

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<sup>12</sup> *Curtis D. Humphrey*, 47 ECAB 553 (1996); *Catherine Adams*, 39 ECAB 829 (1988); *Lorand Hegedus*, 37 ECAB 162 (1985).

<sup>13</sup> *Id.*, *Curtis D. Humphrey*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.11(c)(2)(b) (June 2003) provides: "If a CA-1032 [form] was not issued for the period during which the claimant worked, but the claimant had earnings while receiving compensation, the period of forfeiture is limited to the period that the claimant actually worked and did not report earnings."

<sup>14</sup> On the August 6, 1997 Form CA-1032 appellant reported "yes" in response to the question of whether he had any employment during that period and indicated that he worked from November 1996 to February 1997 at Schwan's Ice Cream earning \$200.00 per week and at Jefferson Bottling Company earning \$7.42 per week depending on commission. Appellant further noted that he worked in May 1997 at Frontinac Crystal Spring Water earning \$7.00 per week.

circumstances of this case, appellant's disclosure of his employment on the August 6, 1997 Form CA-1032 is sufficiently timely and thus he did not forfeit entitlement to compensation for this period.

As appellant forfeited his right to compensation for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997, the compensation paid for these periods constitutes an overpayment of compensation. The Office based its determination of the amount of overpayment, however, on a finding that appellant forfeited compensation from July 1, 1993 to February 25, 1997, May 2 to 23 and June 3 to August 5, 1997. Therefore, the case will be remanded for recalculation of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>15</sup> provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulation<sup>16</sup> provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

### **ANALYSIS -- ISSUE 2**

The Board has found that appellant knowingly failed to report employment activity. The record establishes that appellant had earnings from employment during the period of the forfeiture and knowingly failed to furnish this material information to the Office. On September 1, 1994, April 20 and August 21, 1996 and January 22, 1997, appellant signed a certification clause on a CA-1032 form which advised him that he might be subject to civil, administrative or criminal penalties if he made a false statement or misrepresentation or concealed a fact to obtain compensation. Thus, by signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities or income. Appellant failed to provide information that he knew or should have known to be material when he failed to report his earnings from employment and self-employment on affidavits he completed on September 1, 1994, April 20 and August 21,

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<sup>15</sup> 5 U.S.C. § 8129(b).

<sup>16</sup> 20 C.F.R. § 10.433.

1996 and January 22, 1997.<sup>17</sup> Consequently, he was at fault in the creation of the overpayment from July 1, 1993 to January 22, 1997. Appellant further failed to make an affidavit or report as required when he did not immediately notify the Office of his employment for the period January 22 to February 25, 1997 and May 2 to 23, 1997. As appellant failed to timely furnish material information to the Office regarding his employment status, even though he was notified on Forms CA-1032 of the requirement to immediately report his employment to the Office, he is at fault in the creation of the overpayment for the period January 22 to February 25, 1997 and May 2 to 23, 1997. Consequently, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.<sup>18</sup>

On appeal, appellant argues that the Office found that he was without fault in the creation of the overpayment in its October 27, 2003 decision. However, as discussed above, the Office's indication in a cover letter accompanying its October 27, 2003 decision is clearly a typographical error. The February 20, 2002 memorandum addressing the issue of fault in the decision found appellant at fault in the creation of the overpayment.

Appellant further contends that restitution paid to the U.S. District Court in the amount of \$6,337.26 should be in lieu of further forfeiture overpayment recovery. The Office's procedure manual discusses the interplay between court-ordered restitution in fraud cases and the Office's administrative debt collection process, as follows:

*"19. Court Ordered Restitution in Fraud cases. When a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due to the government, the court often orders the defendant to make restitution to the United States as a condition of probation. The amount of restitution may or may not be the full amount of the debt owed to [the Office]."*

*"a. If the Court Order states that the restitution amount will be in full satisfaction of the debt owed the United States (a 'Global Settlement'), the Court Order takes precedence over the Office's administrative debt collection process. In such cases, if the restitution amount is less than the outstanding debt principal balance, the principal balance must be reduced to the restitution amount set by the court. Also, interest may not be applied to such debts unless stipulated in the Court Order. However, should the probation period end and the debtor has failed to make full restitution of the amount ordered by the court, [the Office] may pursue collection of the full original debt amount."*

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<sup>17</sup> It is well established that information regarding self-employment is considered material and must be disclosed. *See e.g., Larry W. Seybert*, 49 ECAB 197, 202 (1997).

<sup>18</sup> Regarding the repayment of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where, as in this case, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act. *See Robert S. Luciano*, 47 ECAB 793 (1996).

“b. *If the Court Order does not represent a ‘Global Settlement,’* the [Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received. Unless assessment of interest is stipulated in the Court Order, interest may not be applied to the restitution amount and any restitution payments received should be applied directly to the debt principal.”<sup>19</sup> (Emphasis in the original.)

In this case, the court order in question did not indicate that the recovery of \$6,337.26 from appellant in restitution was meant to be in full satisfaction of the debt owed to the United States, *i.e.*, that it was meant to constitute a global settlement.<sup>20</sup> For this reason, the Office was not precluded from continuing to pursue full collection of appellant’s debt after credit for the restitution paid to the court.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation based on his forfeiture of compensation for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997, but the case is not in posture regarding the amount of overpayment. The Board further finds that appellant was at fault in creating the overpayment.

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<sup>19</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300 (September 1994).

<sup>20</sup> See *Clarence D. Ross*, 42 ECAB 556 (1991).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 27, 2003 is affirmed with respect to fact of overpayment and, for the periods July 1, 1993 to February 25, 1997 and May 2 to 23, 1997, the decision is affirmed as modified. The fault finding is also affirmed for the aforementioned periods. The case is remanded for recalculation of the amount of the overpayment.

Issued: January 25, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member